SHANTINI PILLAY NARAYANASAMY PILLAY v. KANNA DASAN NARIANASAMY

HIGH COURT MALAYA, SEREMBAN
ABU BAKAR JAIS J
[DIVORCE PETITION NO: 33-168-10-2014]
28 AUGUST 2018

FAMILY LAW: *Divorce – Proceedings for – Marriage irretrievably broken down – Whether pointless for marriage to continue – Husband's behaviour – Whether wife could be reasonably expected to live with husband – Law Reform (Marriage and Divorce) Act 1976, s. 54(1)(b)*

FAMILY LAW: *Financial obligation – Maintenance – Minor child's education – Whether husband has obligation and responsibility to bear costs of child's education until completion of child's degree or its equivalent*

FAMILY LAW: *Matrimonial property – Division of – Contribution towards welfare of family – Factors to consider – Law Reform (Marriage and Divorce) Act 1976, s. 76*

FAMILY LAW: *Divorce – Maintenance – Factors to consider – Whether granted*

The petitioner and the respondent married in 1990 and had three children. The second child passed away before the hearing of this petition. The eldest child was 26 years old and the youngest was a minor. The petitioner applied for divorce as she alleged that the respondent was having an affair with another woman, was abusive and a chronic alcoholic. Apart from the divorce, the petitioner also prayed for the following relief, *inter alia*: (i) the custody of the children be given to the petitioner with reasonable access to the respondent; (ii) the respondent should bear the costs of their two children's education until the completion of tertiary level; (iii) the division of their matrimonial property; (iv) the respondent to return RM150,000 which he took from a joint bank account in HSBC Bank; (v) the respondent to pay RM7,000 for the eldest child's outstanding diploma college fee; (vi) half of the respondent's EPF to be given to the petitioner; (vii) RM500,000 insurance coverage secured by the respondent for the benefit of the petitioner; and (viii) RM1,000,000 as a global sum for maintenance.

Held (allowing petitioner's claim in part):

(1) Irretrievably broken down means a meltdown to the stage of being pointless to save the marriage. The standard of proof to prove that the marriage is doomed is on the balance of probabilities. As long as there is some evidence, a spouse can indeed prove that the marriage is pointless to be continued. (paras 5, 20 & 22)

(2) There was no reason to dispute that the respondent had not been faithful to the petitioner. His affair with another woman could no longer endear himself to the petitioner. Also, with the support of an independent witness and supporting e-mails, there was little reason to doubt the petitioner's testimony that the respondent had another woman while married to the petitioner. (paras 11 & 14)

(3) The petitioner could not be expected to carry on living and continue to be married to the respondent because of the latter's alcoholism. The respondent's behaviour of drinking would also mean that the petitioner could not be reasonably expected to live with the respondent, triggering the operation of s. 54(1)(b) of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'). (para 17)

(4) The Tribunal Officer's notes pointed to the fact that the respondent admitted he had another woman while married to the petitioner. The officer's notes also showed that the respondent admitted he had drinking problems. In essence, the respondent's extramarital affair and alcoholism had forced this court, without alternative, to conclude that the marriage had irretrievably broken down. The divorce was thus granted. (paras 23 & 24)

(5) The petitioner should have the custody, care and control of the youngest child, while the respondent could remain providing for the child. Reasonable access was granted to the respondent and the arrangement to be met regarding this access was to be discussed between the petitioner and the respondent whenever the respondent requests to see the child. (paras 26 & 27)

(6) Since the eldest child had completed her first degree, the respondent could not be held responsible to also bear the costs of her postgraduate degree. She had passed the tertiary level with her first degree and that should be sufficient to set her off on her own. The respondent was, however, ordered to pay the sum of RM7,000 for the outstanding diploma college fee which was prior to the eldest daughter's undergraduate study. As for the youngest child, the respondent had the obligation and responsibility to bear the costs of the child's education until the completion of the child's degree or its equivalent. Only in the event if the respondent, for some foreseeable reasons, could not use his personal income, his EPF should be used to pay the above educational expenses. (paras 28, 29, 30, 31 & 40)

(7) When the properties were acquired, both the petitioner and the respondent had contributed in some way or other to get these properties for their own mutual use, together with their children. It did not matter who had monetarily contributed more in the acquisition of these

properties. A spouse may pay more, or even the whole sum, for the properties but the other spouse's non-monetary contribution should never be discounted. By virtue of s. 76 of the Act, contribution towards the welfare of the family by looking and caring for the family was also a factor that should be considered in the division of these properties. In this case, the properties were to be sold with the proceeds to be equally divided between the petitioner and the respondent. Any outstanding payments and costs should also be equally shared. (paras 34 & 36)

(8) The car Kia Forte which was already registered under the name of the petitioner would remain with her as she could use it for herself and the youngest child. The respondent would retain the respective cars, *ie*, Kia Sorento and Honda City. On the other hand, the amount in the mutual fund would be divided equally for the benefit of both the petitioner and the respondent. The respondent was also ordered to return the amount of RM150,000 which he had withdrawn from a joint account in HSBC Bank. Moneys in any other bank accounts were to be divided and equally shared between the parties. The respondent also has to provide all latest back accounts' statements to the petitioner. (paras 37, 38, 39, 41 & 42)

(9) The respondent's EPF should remain with him and not to be equally shared with the petitioner, so that he was not left without sufficient means to carry on with his life. The petitioner herself had her own EPF. However, the respondent has to provide insurance coverage for the petitioner and the amount should be restricted to RM200,000. As for maintenance, a fair sum of RM2,500 monthly for the petitioner would be a fair sum to be paid on or before the fifteenth of each month. (paras 44, 46, 47 & 48)

Case(s) referred to:
Ching Seng Woah v. Lim Shook Lin [1997] 1 CLJ 375 CA ***(refd)***
Sivajothi K Suppiah v. Kunathasan Chelliah [2006] 5 CLJ 318 HC ***(refd)***
Wong Kim Foong v. Teau Ah Kau [1998] 1 CLJ 358 HC ***(refd)***

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, ss. 53(1), 54(1)(b), 76, 77(1)(b)

For the petitioner - Cheow Wee & Emily Chong; M/s Cheow Wee & Mai
For the respondent - R Kengadharan; M/s R Kengadharan & Co

Reported by Kumitha Abd Majid

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JUDGMENT

Abu Bakar Jais J:

Keep your eyes wide open before marriage, half shut afterwards

– Benjamin Franklin

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Introduction

[1] The petitioner and respondent fell in love some time ago. They married after that. Fast forward now, the petitioner wants a divorce. Hence, she filed the divorce petition for annulment of the marriage for determination
C by this court. She also as normally done in divorce petitions, claimed consequential reliefs.

Background Facts

[2] The petitioner and respondent got married in 1990. They were blessed
D with three children. The second child passed away before the hearing of the petition. The eldest is already 26 years of age and the youngest is a minor. The petitioner wants a divorce now as she said the respondent had two-timed her. She said while the respondent was working in Sarawak, he became intimate with another woman. She also said the respondent is mean, abusive, violent and a chronic alcoholic.

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[3] Apart from the divorce, the petitioner is requesting the following:

(a) the custody of two out of three of their children with reasonable access to the respondent;

F (b) the respondent to bear the costs of education of their two children until completion of tertiary level;

(c) the respondent to ensure such costs if not met personally, would come from his employees' provident fund ("EPF");

(d) division of their matrimonial properties;

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(e) order pertaining to three vehicles;

(f) division of a mutual fund;

(g) a return of RM150,000 taken by the respondent from a bank account;

H (h) payment of RM7,000 for outstanding college's fee of the eldest child;

(i) division of moneys held in other bank accounts;

(j) statements of bank accounts;

(k) half of the respondent's EPF;

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(l) RM500,000 for insurance coverage;

(m) Cost of the proceeding;

(n) the normal cliché catch-all prayer of any other relief that is deemed fit by this court.

Court's Findings

[4] First, this is a case where s. 53(1) of the Law Reform (Marriage and Divorce) Act 1976 ("the Act") has rightly been invoked by the petitioner. It reads as follows:

> Either party to a marriage may petition for a divorce on the ground that the marriage has **irretrievably broken down.** (emphasis added)

[5] Irretrievably broken down as stated above, means a meltdown to the stage of being pointless to save the marriage. It is a point of no return. It is a situation where it can be cruel, of no purpose and little sense for this court to deny the request made for a divorce. A couple should not be forced to remain living together if there is practically little hope to see them happily married ever after. This court has a duty to set them free of each other if the situation demands it. In this regard, this court must make the assessment and evaluate all relevant circumstances to come to a conclusion indeed the marriage has irretrievably broken down.

[6] The threshold for this should however not be too daunting. In a modern marriage, it is acceptable that the same could fall apart for the slightest reasons. For instance, a spouse saying, "I no longer love you", should not always be cajoled to rethink his or her profound and far-reaching statement is merely an aberration of his or her normal sensible persona. That expression alone could very well mean there is little that can be done to continue hoping for a happy union. If a spouse no longer wants to be together, this court fails to see why he or she should be forced to continue the marriage. After all, these are adults that understood the repercussion of their action ie, their single action of asking for a divorce. And in this regard, it should not be forgotten, at this stage, we are talking about asking for divorce *per se,* not custody of the children, maintenance or any other consequential relief. Granting divorce *per se* should not be too great a problem but granting other consequential reliefs needs a more considered decision and is a different ball game all together.

[7] However, it is agreed, before it is declared by any court that a couple is no longer husband and wife, each case should be decided based only on the peculiar facts of the same.

[8] More so in this particular case before this court, the respondent does not think a divorce is in order. He is still heart-wrenchingly of the fervent hope there is a good possibility that they can stay happily married. Because of the diagrammatically opposing views of the petitioner and respondent on the state of their marriage, it has befallen on this court the unenviable task to make a judgment whether they should remain together or say a permanent good-bye to each other.

[9] A point for consideration towards this end is s. 54(1)(b) of the Act that states:

> In its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to one or more of the following facts, that is to say that the respondent has behaved in such a way that the petitioner cannot be reasonably be expected to live with the respondent.

[10] Thus, the ensuing question of relevance is, can the petitioner in the present case be expected to continue living with the respondent in view of the latter's behaviour?

Betrayal

[11] In this regard, there is no reason to dispute that the respondent had not been faithful to the petitioner. His affair with another woman can no longer endear himself to the petitioner. Indeed, any woman seldom tolerates an outright betrayal of a man in the cosy comfort of another woman's tender embrace. The fact that the respondent had an affair with another woman is supported by the evidence of the tribunal officer who was an independent witness. She testified that the respondent admitted to her that he had an extramarital affair and had verbally abused the petitioner. This is after she referred to the notes she made in interviewing the respondent.

[12] Another witness is the petitioner's sister who testified the respondent wrote an email to her admitting the affair. This court has no reason to doubt her testimony. She stood as a credible witness based on her observed demeanour.

[13] This affair is further established by the email sent by the respondent to their eldest daughter admitting the same.

[14] Besides, with the support of the independent witness and these emails, there is also little reason to doubt the testimony of the petitioner herself that the respondent had another woman while married to the petitioner.

[15] This affair alone is sufficient reason to conclude the marriage had indeed irretrievably broken down.

Alcoholism

[16] Another reason to say the marriage is no longer workable is the fact that the respondent is far from being a teetotaller. Instead at all material times, he was at the extreme end. The tribunal officer also gave evidence that the respondent admitted his drinking problem. Again, she referred to the notes she wrote when she interviewed the respondent for this admission. Because of being an alcoholic, the respondent had abused the petitioner too.

[17] The petitioner cannot be expected to carry on living and continue to be married to the respondent because of the latter's alcoholism. To do so is just too demanding mentally, not to mention also physically risky to the petitioner. The respondent drinking behaviour would also mean the petitioner cannot be reasonably expected to live with the respondent, triggering the operation of s. 54(1)(b) of the Act as shown earlier.

[18] Further, in the midst of preparing the grounds of judgment, judicial notice is taken of the newspaper's report appearing in the 'Star' on 25 August 2018. This report quoted a study involving 195 countries by more than 500 researchers as noted by Max Griswold, a researcher at the Institute for Health Metrics and Evaluation, United States. This study concluded there is no safe level of alcohol. Hence an extensive study has been done to show there is no difference whether you are social drinker or a drunkard.

Weighing The Evidence

[19] Assuming for a moment, the notes and emails referred to by the tribunal officer, respondent's sister in law and respondent's eldest daughter as alluded to earlier must be treated suspiciously and not easily admitted as evidence. Will this mean there is no sufficient evidence to say that the marriage has indeed irretrievably broken down? Can these notes and emails be discarded?

[20] Even if these notes and emails were not before this court at all, the finding that indeed the marriage has irretrievably broken down can still be sustained. First, this is because the standard of proof to prove the marriage is doomed is only on the balance of probabilities. It is only a case who do you believe more – the petitioner or the respondent? The petitioner called two other witnesses to support her. The respondent called no one except himself.

[21] The bottom line is, it matters not whether the notes and emails were part of the evidence before the court.

[22] Second, as explained earlier, the threshold to find a marriage has irretrievably broken down is not too high. As long as there is some evidence, a spouse can prove indeed the marriage is pointless to be continued.

[23] Last but not least, the notes were taken by the tribunal officer herself. She was the maker of the notes. Her notes referred to the fact the respondent admitted she had another woman while married to the petitioner. Her notes also showed the respondent admitted his drinking problem.

[24] Thus, in essence, the respondent's extramarital affair and alcoholism had forced this court, without alternative to sadly conclude the marriage indeed had irretrievably broken down. Thus, this court has no option but to

grant the order of divorce and annulment of marriage as requested. In addition, it is most shocking that the respondent still does not want a divorce to be granted when his wife is no longer interested in him.

Custody And Access

[25] Having decided that annulment of marriage should be pronounced, the next step is to determine the question of the custody and access to the children. There is no dispute that the issue of custody and access is only in respect of the youngest child as the eldest child is now 26-year-old.

[26] It is best custody, care and control of the youngest child should be given to the petitioner. Besides, there is no serious contention or claim by the respondent in his pleading or submission that the custody, care and control of the youngest child should be given to him. The most that is pleaded and contended by the respondent is that he has provided for the child. The petitioner should have the custody, control and care of the child while the respondent could remain providing for the child. As understood, even now, the child is under the care of the petitioner.

[27] However, the fact remains the respondent is the father of the child. Therefore, he should not be deprived of access to the child. As such, reasonable access is granted to the respondent and the arrangement to be met regarding this access is to be discussed between the petitioner and respondent whenever the respondent requests to see the child.

Bearing The Costs Of Education Of Their Two Children Until Completion Of Tertiary Level

[28] The eldest child according to evidence has completed her undergraduate degree and now is in the process of completing her postgraduate study. Since she has completed her first degree, the respondent cannot be responsible to also bear the costs of her postgraduate degree. She has passed the tertiary level with her first degree. That should be sufficient to set her off on her own. After all, she is already 26-year-old. Otherwise, there could be no end for a spouse to bear his or her child's costs of education. A child could go on a degree after degree quest if he or she knows their parents would stand ready to oblige. This could be fair expectation on rich parents but too much to ask for the rest.

[29] On the other hand, in the case of the youngest child, the respondent as a father has the obligation and responsibility to bear the educational expenses at least until the completion of undergraduate level or its equivalent. This is also in line with the cherished universal values where the man in the house should shoulder the responsibility of educating his offspring.

[30] This court therefore orders the respondent to bear the costs of his youngest child's education until the completion of the first degree or its equivalent.

The Respondent To Ensure Such Costs If Not Met Personally, Would Come From His EPF

[31] Only in the event that the respondent for some foreseeable reasons could not use his personal income, it is also ordered that his EPF should be used to pay the educational expenses of his youngest child until the completion of the undergraduate degree or its equivalent. This is to ensure there would not be unnecessary disruption to the child's education.

Division Of Their Matrimonial Properties

[32] During the course of marriage, the petitioner and respondent had acquired the matrimonial house and an apartment.

[33] In this regard, s. 76 of the Act empowers this court to make orders with regard to these properties as the provision states:

Power for court to order division of matrimonial assets

(1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.

(2) In exercising the power conferred by subsection (1) the court shall have regard to:

(a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;

(b) any debts owing by either party which were contracted for their joint benefit;

(c) the needs of the minor children, if any, of the marriage, and subject to those considerations, the court shall incline towards equality of division.

(3) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.

(4) In exercising the power conferred by subsection (3) the court shall have regard to:

(a) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring the family;

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(b) the needs of the minor children, if any, of the marriage, and subject to those considerations, the court may divide the assets or the proceeds of sale in such proportions as the court thinks reasonable; but in any case the party by whose effort the assets were acquired shall receive a greater proportion.

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(5) For the purposes of this section, references to assets acquired during a marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts

[34] There can be no doubt that when the properties were acquired, both the petitioner and respondent had contributed in some ways or other to get these properties for their own mutual use, together with their children. It is to be enjoyed by all of them. No one should stake an exclusive ownership of these properties. It matters not who had monetarily contributed more in the acquisition of these properties. A spouse may pay more or even the whole sum for the properties but the other spouse non-monetary contribution should never be discounted. As indicated by the statutory provision above, contribution towards welfare of the family by looking and caring for the family is also a factor that should be considered in the division of these properties. And in this regard, neither the petitioner nor the respondent can deny each other contribution, be it monetary or otherwise, for the welfare of the family. Besides far too often, contribution, be it in a divorce case such as this or in other aspects of life, is always measured in terms of money but totally ignoring contribution in other forms, which in the latter cases could be more significant and meaningful than the former.

[35] The above finding is consistent with the Court of Appeal's case of *Ching Seng Woah v. Lim Shook Lin* [1997] 1 CLJ 375; [1997] 1 MLJ 109 where it is said as follows:

> During the subsistence of a marriage, the expression 'matrimonial assets' refers to the matrimonial home and everything which is put into it by either spouse with the intention that their home and chattels should be a continuing resource for the spouses and their children to be used jointly and severally for the benefit of the family as a whole. **It matters not in this context whether the asset is acquired solely by the one party or the other or by joint efforts.** Whilst the marriage subsists, these assets are matrimonial assets. (emphasis added)

[36] Therefore, the correct and fair order to be made is the sale of these properties with the proceeds to be equally divided between the petitioner and the respondent. Any outstanding payments and costs should also be equally shared. This also obliterates or at least minimises the potential bickering that could develop after the case is decided, as to who should get what regarding these properties.

Order Pertaining To Three Vehicles

[37] There are three cars that are now to be divided between the petitioner and the respondent. The first car Kia Forte is already registered under the name of the petitioner ie, the car with the registration number NCM 996. This should remain with the petitioner who can use it for herself and the youngest child. The second car, Kia Sorento with registration number KDC 6663 is already in the name of the respondent. He should be allowed to retain this car. Another car, Honda City with the registration number WPW 6283 should also be retained by the respondent. This order pertaining to these vehicles is fair in view of what has been allotted to the petitioner and respondent as mentioned earlier and the other division of monetary allocations further for both as will be explained underneath.

Division Of A Mutual Fund

[38] There is no denial by the respondent; there is some amount in the mutual fund. It is also fair, this amount be divided equally for the benefit of both the petitioner and respondent.

A Return Of RM150,000 Taken By The Respondent From A Bank Account

[39] The petitioner prayed for an order that the respondent returns the amount RM150,000 withdrawn by the respondent from a joint-account in HSBC Bank. Since the respondent did take out RM150,000 from this account, as prayed, the respondent is ordered to return this amount.

Payment Of RM7,000 For Outstanding College's Fee Of The Eldest Child

[40] The outstanding college's fee of RM7,000 is in relation to the diploma certificate to be released for the eldest daughter. Though it has already been decided that the respondent is no longer responsible for his eldest daughter's postgraduate study, this is in relation to a diploma prior to her undergraduate study. Therefore, the respondent should pay for this.

Division Of Moneys Held In Other Bank Accounts

[41] Moneys in any other bank accounts to be divided and equally shared.

Statements Of Bank Accounts

[42] The respondent is also to provide all latest bank accounts statements to the petitioner.

Half Of The Respondent's EPF

[43] The petitioner had so far been granted equal share of almost everything as indicated above. However, the petitioner still wants half share of the respondent's EPF.

[44] This is where a line must be drawn. The petitioner should not be given almost everything of the respondent. The respondent needs to continue with his life after this devastating divorce to him. After all, as indicated, he still thinks that the marriage could be saved. His EPF should remain with him and not be equally shared with the petitioner, so that he is not left without sufficient means to carry on with his life. After all, he still needs to be responsible to pay for his youngest child's education as ordered earlier by this court. On top of this, the petitioner herself has her own EPF. She could use her own EPF together with other moneys already ordered earlier and not to forget the provision she would also get as indicated below. As such, the very least she should do now is to refrain from being seen as too hard on the respondent by also demanding half share of his EPF.

RM500,000 For Insurance Coverage

[45] The petitioner has every right to be hopeful that she would live happily ever after with the respondent and their blessed children. But fate has it that is not to be. Had the marriage succeed till death do they part, she would also be protected to the tilt by the respondent. That would mean, it is not far-fetch that the respondent would provide for her old age even when the respondent is no longer to be. In modern times, more often than not, this is only possible through insurance.

[46] Therefore, it is only fair that the petitioner be given insurance coverage by the respondent. However, the amount should be restricted to RM200,000 and not RM500,000 as requested. The full amount if granted, would not be fair to the respondent who must be given some leeway in this respect.

Maintenance

[47] The petitioner should also not be denied payment of maintenance by the respondent. This is allowed under s. 77(1)(b) of the Act that states:

> The court may order a man to pay maintenance to his wife or former wife when granting or subsequent to the grant of a decree of divorce or judicial separation.

[48] This court is of the opinion that a fair sum is RM2,500 monthly for the petitioner to be paid on or before the fifteenth of each month as maintenance. This court does not think RM1,000,000 for a global sum as requested by the petitioner for the last 25 years is fair on the respondent. Again, the petitioner has been allotted quite a lot as indicated earlier. Therefore, the amount RM1,000,000 requested should not be further allowed for her. This is also not to enrich her but to recognise that some maintenance is due to her from the respondent for her to carry on with her life especially with the youngest child.

[49] This court has also taken note the fact the petitioner is working should not deprive her of maintenance as decided in the case of *Wong Kim Foong v. Teau Ah Kau* [1998] 1 CLJ 358 where it said as follows:

> Another salutary principle which should be repeated is this. The fact that the wife is gainfully employed and has her own income does not disentitle her to maintenance from her husband, nevertheless the quantum of such payment may be reduced.

[50] This court has also taken note why maintenance is appropriate for the petitioner as indicated in the case of *Sivajothi K Suppiah v. Kunathasan Chelliah* [2006] 5 CLJ 318; [2006] 3 MLJ 184 where Azahar Mohamed JC (now FCJ) said as follows:

> ... Faiza Tamby Chik J granted the order for maintenance on 15 December 1999 (see *Sivajothi a/p K Suppiah v. Kunathasan a/l Chelliah* [2000] 6 MLJ 48. According to the learned judge, and I respectfully agree with him, maintenance signify any form of material provision that will enable an adult to live a normal life and a child to be brought up properly. Thus, maintenance cannot mean only mere subsistence, i.e the food she puts in her mouth but must also means the clothes on her back, the house in which she lives and the money which she has to have in her pocket, all of which vary according to the means of the man who leaves a wife behind. Moreover, it is settled law that it is the duty of the father to maintain the standard of living the children had enjoyed in the past, ie during the existence of the marriage.

Conclusion

[51] In this case, the marriage had irretrievably broken down because of the respondent being unfaithful and that the respondent was also an alcoholic at all material times. There is extremely little hope for the marriage to continue.

[52] Therefore, it is only right that the divorce be granted and the annulment of the same be pronounced. Consequential reliefs for the petitioner are also allowed as explained.